DARMA SURIA RISMAN SALEH A

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA B
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CRIMINAL APPEAL NO: 05-70-2009(B)]
9 OCTOBER 2009 C

PREVENTIVE DETENTION: *Detention order - Habeas corpus - Application for - Whether appellant's activity constituted an act prejudicial to public order - Whether Minister committed error in law in making detention order - Whether High Court correct in declining habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969* D

The appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") on 4 April 2008. An order was made by the Minister under s. 4(1) of the Ordinance detaining the appellant for a period of two years. The appellant made representations to the Advisory Board constituted under art. 151(2) of the Constitution. The Board dismissed his appeal by making the relevant recommendations to the Yang Di-Pertuan Agong. The appellant then moved to the High Court for an order of *habeas corpus*. The High Court declined to grant the order, hence this appeal. The issue that arose was whether the Minister had acted lawfully in classifying the activity the appellant was alleged to be involved in, which was the smuggling of stolen cars out of Malaysia, as constituting an act prejudicial to public order. E F G

Held (dismissing appeal)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) An act of smuggling stolen cars may *per se* not be prejudicial to public order but this was a case in which a syndicate was involved, as the grounds of detention clearly stated. This activity had the effect of providing for thieves and would be thieves a ready market for the disposal of stolen cars. This had the obvious potential to disrupt public tranquility because no car may be safe from being either robbed or stolen and its recovery made impossible by reason of the appellant's assistance in their disposal. (para 12) H I

(2) There was no doubt that the activity engaged in by the appellant had the potential to disrupt the even tempo of the life of the community. The even tempo of life of the community is disrupted when there is serious risk of loss of property through theft. It followed that a reasonable decision-maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instant did not therefore commit any error of law in making the order he did. The High Court was correct in declining *habeas corpus.* (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah ditahan di bawah peruntukan-peruntukan Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ("Ordinan") pada 4 April 2008. Perintah ini dibuat oleh Menteri di bawah s. 4(1) Ordinan tersebut dengan menahan perayu untuk tempoh dua tahun. Perayu membuat representasi kepada Lembaga Penasihat yang dilantik di bawah art. 151(2) Perlembagaan. Lembaga Penasihat menolak rayuan perayu dengan syor-syor yang relevan kepada Yang Dipertuan Agong. Perayu kemudiannya membawa kes ini ke Mahkamah Tinggi untuk satu perintah *habeas corpus*. Mahkamah Tinggi tidak membenarkan perintah tersebut dan perayu merayu. Isu yang dibangkitkan adalah sama ada Menteri telah bertindak secara sah mengikut undang-undang dalam mengelaskan aktiviti perayu yang didakwa terlibat di dalam kegiatan penyeludupan kereta curi untuk dibawa keluar dari Malaysia, sebagai merupakan suatu kegiatan yang memudaratkan ketenteraman awam.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Suatu kegiatan penyeludupan kereta curi yang tersendiri mungkin tidak akan memudaratkan ketenteraman awam, tetapi ini adalah kes yang melibatkan satu sindiket, yang dengan jelasnya telah menjadi asas kepada penahanan tersebut. Kegiatan ini telah memberikan impak bagi pencuri dan yang akan menjadi pencuri, dengan menyediakan pasaran yang sudah tersedia untuk menjual kereta curi. Ini dengan jelas berpotensi untuk mengganggu ketenteraman awam kerana tidak

ada kereta yang mungkin akan selamat dari dirompak atau dicuri dan untuk menjumpai semula adalah mustahil dengan sebab bantuan daripada perayu untuk menjual kereta-kereta curi tersebut.

(2) Tidak ada keraguan bahawa perayu terbabit dalam kegiatan yang mempunyai potensi untuk mengganggu rentak kehidupan masyarakat yang aman. Rentak kehidupan masyarakat yang aman akan terganggu bila ada risiko yang serius tentang kehilangan harta benda melalui kecurian. Berikutan itu, seseorang pembuat keputusan yang munasabah ketika dikemukakan dengan fakta-fakta yang terkandung di dalam pernyataan berkanun akan memutuskan bahawa kegiatan perayu itu memudaratkan ketenteraman awam. Menteri dalam kes ini tidak melakukan apa-apa kesilapan dari segi undang-undang dalam membuat perintah yang telah di laksanakannya. Mahkamah Tinggi telah membuat keputusan yang betul dengan menolak *habeas corpus*.

Case(s) referred to:

Cameron v. Gibson [2005] CSIH 83 ***(refd)***

Collector and District Magistrate v. S Sultan AIR [2008] SC 2096 ***(refd)***

Lim Thian Hock & Ors v. Minister of Home Affairs & Anor [1992] 4 CLJ 2289; [1992] 2 CLJ (Rep) 781 HC ***(refd)***

Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam & Another Case [1993] 4 CLJ 336 SC ***(refd)***

Merdeka University Bhd v. Government of Malaysia [1982] 1 LNS 1 FC ***(refd)***

Re Application of Tan Boon Liat [1976] 1 LNS 126 HC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), (4)

Federal Constitution, art. 151(2)

For the appellant - P Visnuvarman; M/s Alvinthiren & Partners
For the respondents - Najib Zakaria SFC

[Appeal from High Court, Shah Alam; Criminal Application No: MT2-44-127-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Gopal Sri Ram FCJ:

[1] The appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") on 4 April 2008. An order was made by the Minister under s. 4(1) of the Ordinance detaining the appellant for a period of two years. A statement of facts of the same date was served on the appellant in accordance with s. 4(4). These two provisions read as follows:

> 4(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.
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> 4(4) Whenever any person is detained under any order made under sub-section (1) he shall, in accordance with Article 151 of the Constitution, as soon as may be:
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> (a) be informed of the grounds of this detention;
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> (b) subject to Clause (3) of the said Article (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) be informed of the allegations of fact on which the order is based; and
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> (c) be given the opportunity of making representations against the order as soon as may be.

[2] The appellant made representations to the Advisory Board constituted under art. 151(2) of the Constitution. After hearing the appellant's representations, the Board dismissed his appeal by making the relevant recommendations to the Yang di-Pertuan Agong. The appellant then moved the High Court for an order of *habeas corpus*. The High Court having declined to grant the order, the appellant has appealed to us.

[3] The Minister's order makes it clear that he directed the detention of the appellant with a view to preventing him from acting in a manner prejudicial to public order. In a gist, the statement of facts on which the Minister based his order recites that the appellant was involved in the smuggling of stolen cars out

of Malaysia. The statement condescends to particulars of dates and places where the appellant carried out his activities. The only issue before the High Court and before us is whether the Minister acted lawfully in classifying the activity the appellant is alleged to be involved as constituting an act prejudicial to public order. In order to deal with this issue we must address our minds to the way in which s. 4(1) of the Ordinance is constructed.

[4] It is to be noted that the section says "if the Minister is satisfied". The first question that has to be determined is whether that phrase imports a subjective or an objective element. A similar statutory formula came up for consideration in *Merdeka University Bhd v. Government of Malaysia* [1982] 1 LNS 1 FC. There the words used by the statute were "If, the Yang di-Pertuan Agong is satisfied". In interpreting that statutory formula, Suffian LP said:

> It will be noted that section 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable - see the cases cited by the learned Judge.

In the same case Abdoolcader J at first instance had this to say:

> It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in section 6(1) of the 1971 Act might be sufficient to exclude judicial review, but the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds.

[5] Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is

whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

[6] There is a principle of ancient repute that:

> ... where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied." *Reg. v. Home Secretary ex p. Khawaja* [1984] 1 AC 74, per Lord Scarman.

And as Lord Kingarth observed in *Cameron v. Gibson* [2005] CSIH 83:

> Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made *ultra vires* ... when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have ...

[7] That then brings us to the central question whether the activity in which the appellant was involved in was prejudicial to public order. If it is not, then *habeas corpus* must issue. This is because whether particular activity comes within the scope of being prejudicial to public order is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter upon that question. This much is made clear by the several authorities on the subject and is implicit from the leading case of *Re Application of Tan Boon Liat* [1976] 1 LNS 126 (affirmed on appeal in [1977] 2 MLJ 18) where Abdoolcader J said:

> The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term 'public order' in *Romesh Thappar v. State of Madras* AIR [1950] SC 124, 127 (in particular at page 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquillity, that 'public safety' is a part of the wider concept of 'public order', that 'public safety' ordinarily means security of the public or their freedom from danger and in that

sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety.

[8] The latest pronouncement on the subject is that of the Indian Supreme Court in *Collector and District Magistrate v. S Sultan* AIR [2008] SC 2096, where Dr Arjit Pasayat J said:

> The crucial issue, therefore, is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only.
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> ...
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> 'Public order' is synonymous with public safety and tranquillity: 'it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State'. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. (See *Dr. Ram Manohar Lohia v. State of Bihar & Ors* [1966] (1) SCR 709).
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> 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in

A question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. (See *Kishori Mohan Bera v. The State of West Bengal* (1972 (3) SCC 845); *Pushkar Mukherjee v. State of West Bengal* (1969 (2) SCR 635); *Arun Ghosh v. State of West Bengal* (1970 (3) SCR 288); *Nagendra Nath Mondal v. State of West Bengal* (1972 (1) SCC 498)].

[9] In support of his argument that the appellant's activity comes within the scope of 'public order' learned senior federal counsel referred us to the following passage in the judgment of Vincent Ng J (later JCA) in *Lim Thian Hock & Ors v. Minister of Home Affairs & Anor* [1992] 4 CLJ 2289; [1992] 2 CLJ (Rep) 781 HC where he said this with reference to the jurisdictional requirement 'public order' appearing in s. 4(1) of the Ordinance:

> The first limb of the section seeks to allow the Minister to detain:
>
> (a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence ...

In *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam & Another Case* [1993] 4 CLJ 336, LC Vohrah J when delivering the judgment of the Supreme Court referred to the foregoing passage with no adverse comment. This, says learned senior federal counsel, constitutes an affirmation by the Supreme Court that smuggling is prejudicial to public order.

[10] With respect, we are unable to accept this rather over-simplistic submission of learned senior federal counsel. The court in *Lim Thian Hock v. Minister of Home Affairs* was concerned with the detention order made under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Hence the reference to the act of smuggling as falling within the purview of public order was wholly unnecessary to the fact pattern before the learned judge. It is a comment made in passing and without the benefit of mature argument. It is therefore pure *obiter dicta* and lacks even persuasive authority. As for *Lee Gee Lam*, all that the Supreme Court did was to make reference to the fact that the learned

judicial commissioner whose judgment was under appeal had adopted the reasoning he had expressed in *Lim Thian Hock*. There is absent in the judgment of the Supreme Court any express approval of the proposition that the act of smuggling comes within the scope of public order.

[11] In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquillity.

[12] The question is: does the activity engaged in by the appellant come within the foregoing test? In our judgment it does. What the appellant was engaged in was the illegal export of stolen cars. An act of smuggling stolen cars may *per se* not be prejudicial to public order but this is a case in which a syndicate was involved, as the grounds of detention clearly state. This activity had the effect of providing for thieves and would-be thieves a ready market for the disposal of stolen cars. This has the obvious potential to disrupt public tranquillity. Because no car may be safe from being either robbed or stolen and its recovery made impossible by reason of the appellant's assistance in their disposal. There is no doubt also that the activity engaged in by the appellant had the potential to disrupt the even tempo of the life of the community. The even tempo of life of the community is disrupted when there is serious risk of loss of property through theft. It follows that a reasonable decision-maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instance did not therefore commit any error of law in making the order he did.

[13] For the reasons already given, we are of the view that the High Court was correct in declining *habeas corpus*. This appeal is accordingly dismissed.